

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

76-2156

To be argued by
MICHAEL CANNON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2156

RICHARD A. JENKINS,

Petitioner-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE

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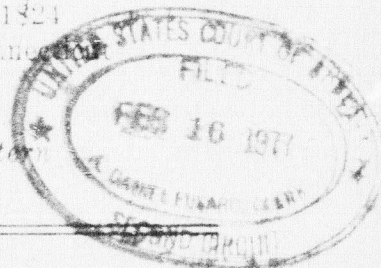


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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-2156

RICHARD A. JENKINS,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE APPELLEE

Statement of the Case

On September 25, 1972, a federal grand jury in New Haven returned a three count indictment charging Richard Jenkins and four co-defendants with violation of Title 18, United States Code, Section 2113(a)(b)(d). On June 29, 1973, after a three-week trial conducted before Judge Jon O. Newman, the jury found Jenkins guilty on all counts. Judge Newman sentenced Jenkins to 18 years in prison under Title 18, United States Code, Section 4208(a)(2). Jenkins' conviction was affirmed, *United States v. Jenkins*, 496 F.2d 57 (2d Cir. 1974), and certiorari was denied on February 18, 1975, 420 U.S. 925 (1975).

On October 21, 1976, Jenkins *pro se* petitioned the District Court to convene a three-judge court to consider

his claim that Title 18, United States Code, Section 2113 is unconstitutional, and to grant a preliminary injunction restraining the enforcement of that section. Judge Newman, treating the claims as a Motion to Vacate Sentence under 28 United States Code, Section 2255, denied the petition.

The petitioner filed a timely Notice of Appeal.

Statutes Involved

Title 18, United States Code, § 2113:

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away with intent to steal or purloin, any property or money or any other

thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

Public Law 94-381, 90 Stat. 1119 (August 12, 1976):

An Act to Improve judicial machinery by amending the requirement three-judge court in certain cases and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2281 of title 28, United States Code, is repealed.

Sec. 2. That section 2282 of title 28, United States Code, is repealed.

Sec. 3. That section 2284 of title 28, United States Code, is amended to read as follows:

"2284. Three-judge court; when required; composition; procedure

"(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional district or the apportionment of any statewide legislative body.

"(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

"(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

"(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules

of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment."

Sec. 4. The analysis of chapter 155 of title 28, United States Code, is amended to read as follows:

"Sec.

"2281. Repealed.

"2282. Repealed.

"2283. Stay of State court proceedings.

"2284. Three-judge district court; when required; composition; procedure."

Sec. 5.(a) Section 2403 of title 28, United States Code is amended—

(1) by inserting the subsection "(a)" immediately before "In" and

(2) by adding at the end thereof the following new subsection:

"(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitu-

tionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

(b) The catchline to section 2403 of title 28, United States Code, is amended to read as follows:

"§ 2403. Intervention by United States or a State; constitutional question."

Sec. 6. Item 2403 of the analysis of chapter 161, of title 28, United States Code, is amended to read as follows:

"2403. Intervention by United States or a State; constitutional question."

Sec. 7. This Act shall not apply to any action commenced on or before the date of enactment.

Approved August 12, 1976.

Title 28, United States Code, § 2255:

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or

that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by

motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him or that such court has denied him relief unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Questions Presented

- I. Did the District Court err in refusing to grant petitioner's Motion to Convene a Three-Judge Court?
- II. Did the District Court err in treating petitioner's Motion to Convene a Three-Judge Court and Motions for a Temporary Restraining Order and Preliminary Injunction as a Motion to Vacate Sentence under 28 United States Code, § 2255?
- III. Did the District Court err in denying relief to petitioner under Section 2255?

ARGUMENT

POINT I

The District Court Properly Refused to Grant Petitioner's Motion to Convene a Three-Judge Court.

Petitioner filed his "MOTION FOR A THREE-JUDGE COURT TO CONVENE" on October 21, 1976 in the United States District Court for the District of Connecticut. In his "Notice of Appeal," filed on November 22, 1976, Petitioner claims to have filed the motion in September, 1976. In either event, Congress'

repeal of 28 United States Code, § 2282 by Pub. L. 94-381, 90 Stat. 1119, effective on August 12, 1976, meant that as of that date the District Court could not convene a three-judge court in cases involving motions for interlocutory or permanent injunctions restraining enforcement of Acts of Congress assertedly repugnant to the Constitution. (Pub. L. 94-381, § 2). By that same Act, 28 U.S.C. § 2284 was amended to state expressly those cases which, after August 13, 1976, would require resolution by a three-judge court. (Pub. L. 94-381, § 3(a)). Three-judge courts shall be convened in cases challenging the constitutionality of any statute apportioning congressional districts or apportioning any statewide legislative body, an issue obviously not here before the court, and in any other case designated by Congress as requiring a three-judge court. At present that includes suits under several sections of the Voting Rights Act of 1965, 42 U.S.C. § 1971(g), 1973 b(a), 1973 c, and 1973 h(c); and suits brought by the Attorney General under public accommodations and equal employment provisions of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-5(b), 2000e-6(b). Petitioner's case, then, clearly lies outside the scope of 28 U.S.C. § 2284.

Moreover, even if Petitioner had filed before the repeal of 28 U.S.C. § 2282, a single-judge would still have the authority and duty to reject a motion to convene a three-judge court which failed to raise a substantial federal question. *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 114-116 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966); and *Green v. Board of Elections of City of New York*, 380 F.2d 445 (2d Cir. 1967). Such insubstantiality results when the motion is "obviously without merit" or when its unsoundness is manifest from previous decisions of the Supreme Court, *William Jameson, supra*, both of which conditions obtain in the instant case. (See Point III, *infra*.)

POINT II

The Court Properly Treated Petitioner's Motion to Convene a Three-Judge Court and Motions for a Temporary Restraining Order and Preliminary Injunction as a Motion to Vacate Sentence under 28 U.S.C. § 2255.

In seeking relief pursuant to a repealed statute, petitioner left Judge Newman with two options. He could simply deny the motion to convene a three-judge court, a ruling that would ensure that petitioner would soon return again, this time entitling his pleading "Motion to Vacate Sentence," but advancing precisely the same arguments. However captioned, the petitioner's argument is an attack upon his conviction on the ground that the trial court lacked subject matter jurisdiction; the relief he seeks is release from confinement, whether he demands an injunction restraining enforcement of 18 U.S.C. § 2113 under which he was convicted or an order vacating his sentence.

Judge Newman's other alternative was to show solicitude for this *pro se* petitioner's inartful attempts at pleading and forego the opportunity to dismiss his petition for what was essentially a technical error, albeit a significant one, in pleading. As already indicated, the only plausible construction of petitioner's motion is as an attack upon his sentence under Section 2255. In considering it such, Judge Newman was following the recent recommendation of the Advisory Committee to the Judicial Conference:

The movant [under 2255] should not be barred from an appropriate remedy because he has mis-styled his motion . . . The court should construe it as whichever one is proper under the circumstances and decide it on the merits.

Advisory Committee Notes to Rules Governing Section 2255 Proceedings, Rule 2 (1976).

"The fact is that if a prisoner is entitled to the relief he prays for, it will be granted irrespective of the designation of the petition."

Meyer v. United States, 424 F.2d 1181 (8th Cir.), *cert. denied*, 400 U.S. 943 (1970). See also, *Paroutian v. United States*, 370 F.2d 631 (2d Cir.), *cert. denied*, 387 U.S. 943 (1967).

Petitioner naturally argues that he did not intend his pleading to be construed as a Section 2255 attack upon his sentence, an understandable position given the adverse decision on the merits. However Judge Newman's course of action, generous to the petitioner, was clearly proper and fully justified by the policies behind Section 2255 relief and considerations of judicial economy.

POINT III

The Court Properly Denied Relief under § 2255.

Petitioner attacks the subject matter jurisdiction of the trial court by challenging the constitutionality of Title 18, U.S.C. § 2113. His argument is essentially that since FDIC does not insure against bank robberies, there is no federal interest sufficiently implicated in the robbery of a state-chartered, FDIC-insured bank to justify the assertion of federal jurisdiction over such robberies. This argument is without merit or novelty.

The contentions raised by this petitioner were considered and rejected in *Way v. United States*, 268 F.2d 785 (10th Cir. 1959) and *Pigford v. United States*, 518 F.2d 831 (4th Cir. 1975). There, as here, the arguments

were that because the FDIC only insures depositors against losses due to insolvency of the bank, the petitioner could not constitutionally be brought into federal court for robbing a state-chartered, FDIC-insured bank. The Courts in both cases held that Section 2113(f) did not require the Government to show that the act for which the petitioner had been prosecuted under Section 2113 tended to injure the FDIC. In *Way*, the Tenth Circuit found that Section 2113(f) by its terms made an FDIC-insured state-chartered bank a part of the federal banking system. The act of robbing such an institution thus threatened the stability and integrity of the federal banking system no less than the same act directed against a federally-chartered bank.

"By the passage of Section 2113(b), Congress intended more than the protection of the [FDIC] from loss because of insured bank deposits. Its purpose was to protect and safeguard the financial stability of the Federal Reserve Bank System and the members thereof."

Way, supra, 268 F.2d at 786. The *Pigford* Court agreed:

"Nor is there any merit in petitioner's contention that there is no jurisdiction because the FDIC insures only against losses caused by bad banking practices or 'financial irregularities,' not against robbery. The use of the term 'insured' by the [FDIC] in Section 2113(f) is for the purpose of identifying which banks are covered by Section 2113 and warrants no inference as to the coverage of FDIC insurance."

Pigford, supra, 518 F.2d at 833.

These cases rest upon a rigorously tested and firmly settled constitutional doctrine. Congress had created a complex structure of interrelated instrumentalities to

regulate and promote the banking industry. Its power to create this system has been consistently upheld, *McCulloch v. Maryland*, 4 Wheat. 316 (U.S. 1819); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); and *Westfall v. United States*, 274 U.S. 256 (1927). One of these federal banking system instrumentalities is the Federal Deposit Insurance Corporation. State banks which, with the consent of the state, insure their depositors' funds with the FDIC become instrumentalities of the federal government. *Weir v. United States*, 92 F.2d 634 (7th Cir.), *cert. denied*, 302 U.S. 761 (1937). The implication of so doing was summarized by Justice Holmes in *Westfall v. United States*, *supra*, 274 U.S. at 258:

"The argument is that Congress has no power to punish offences against the property rights of State banks And if a state bank chooses to come into the System created by the United States, the United States may punish acts injurious to the System, although done to a corporation that the State also is entitled to protect. The general proposition is too plain to need more than statement."

Thus it is indisputable that Congress did not invade powers exclusively reserved to the states when it made robbery of a state-chartered, FDIC-insured bank a federal offense. *Toles v. United States*, 308 F.2d 590, 594 (9th Cir. 1962), *cert. denied*, 375 U.S. 836 (1963); *Clark v. United States*, 184 F.2d 952, 954 (19th Cir. 1950), *cert. denied*, 340 U.S. 955 (1951); *Curtis v. Hiatt*, 169 F.2d 1019, 1021 (2d Cir. 1948), *cert. denied*, 336 U.S. 921 (1949). The holdings in *Way v. United States*, *supra*, and *Pigford v. United States*, *supra*, reinforced and clarified the abundantly-supported proposition that Congress did not overreach itself in extending Section 2113's protection to FDIC-insured state banks even though the

FDIC does not insure against robbery. These cases, factually indistinguishable from the instant one, speak directly to petitioner's argument; petitioner's claim therefore must fail.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

Memorandum of Decision
UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Civil No. N 76-353

RICHARD A. JENKINS

v.

UNITED STATES OF AMERICA

Petitioner, an inmate at the United States Penitentiary, Atlanta, Georgia, contends, in a petition filed pursuant to 28 U.S.C. § 2255, that this Court did not have subject matter jurisdiction over his case when he was tried and convicted of armed bank robbery in September, 1973. The alleged lack of jurisdiction is based on petitioner's claim that the Federal Deposit Insurance Corporation (FDIC) insures depositors against losses from bank failure, but does not insure banks against losses from armed robberies.

The claim is without merit. Congress passed 18 U.S.C. § 2113 to protect the financial stability of the Federal Reserve Bank System and its members. *Way v. United States*, 268 F.2d 785 (10th Cir. 1959). The term "insured by the Federal Deposit Insurance Corporation" in § 2113(f) is used for the purpose of identifying which banks are covered by the section. *Pigford v. United States*, 518 F.2d 831 (4th Cir. 1975).

The petition is dismissed; the papers may be filed without fee.

Dated at New Haven, Connecticut, this 21 day of October, 1976.

/s/ JON O. NEWMAN

Jon O. Newman
United States District Judge

★ U. S. Government Printing Office 1976— 714-017-ACT-310

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-2156

RICHARD A. JENKINS,
PETITIONER-APPELLANT

v.

U S A,
RESPONDENT-APPELLEE

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara _____, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street,
New York, N. Y. 10023

That on the 16th day of February, 1977, deponent served the within Brief and Appendix for the Appellee
upon Richard A. Jenkins, #96589, Box PMB, Atlanta, Georgia 30315

Petitioner
Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 16th day of February, 197 7

[Signature]

SWITLEY JAMES
Notary Public, State of New York
No. 24-450765
Qualified in Kings County
Commission Expires March 30, 1977